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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-450

BELLINGHAM STEVEDORING COMPANY,

Petitioner,

—v.—

DAMPSKIBSAKTIESELSKABET, *etc., et al.*,
INTALCO ALUMINUM CORPORATION and
AMERICAN METAL CLIMAX, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth District, filed in the above case on March 24, 1972.

Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit printed in Appendix A hereto is reported in 457 F.2d 889. It unanimously affirmed the final judgment of the United States District Court for the Wsetern District of Washington, Northern Division, entered on November 21, 1969 and printed in Appendix "B".

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 24, 1972.

A petition for rehearing ~~in banc~~ was timely filed on April 4, 1972 and denied on June 12, 1972. A Petition for Re hearing en banc was denied and filed on August 7 1972

The jurisdiction of this Court is invoked under 28 USC (Section 1254, Sub-section (b)), i.e. where a Court of Appeals has in effect by its decision sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Questions Presented

a) Whether the words and actions of the Trial Court without any justification, at the opening of the trial, were calculated to and in fact did deny the defendant its basic, constitutional and civil right to be represented at the trial of this action by counsel of its choice.

b) Whether there was any evidence whatsoever to sustain the decision of the District Court or whether the only factual evidence presented at the trial was disregarded

and the decision founded on speculative deductions of experts based largely on a survey of the damaged crane, from which plaintiff's experts were excluded from participation.

c) Whether Jebsens, the Time-Charterer, and American Metal Climax, the Voyage-Charterer, cannot recover against Bellingham.

Statement of the Case

These two actions were instituted initially for approximately $55,000 on November 30, 1967; several months later, after a survey of the damaged crane by experts of the respondent, Italco, in which petitioner's surveyor was present and attempted to participate but was excluded from participation, Italco filed a cross-complaint in the sum of $123,533.08 against petitioner.

Because of this escalation of the claim to major litigation and because the respondent Italco and the other parties were all represnted by admiralty counsel of long standing, petitioner designated Samuel C. Otto, senior admiralty counsel from New York to proceed to Seattle to act as chief counsel because of his dual qualifications as knowledgeable in the field of forensic engineering and his broad admiralty experience.

As will appear from the record, the Court was incensed at the appearance of senior admiralty counsel and his two assistants from New York in his courtroom and incredibly refused to permit him to act as chief counsel for petitioner. In fact, permission to participate at all was, as the following will establish, made wholly dependent upon the acquiescence of petitioner's local counsel with whose prestige the court seemed more concerned than with the right of petitioner to be represented by counsel of its choice.

REASONS FOR GRANTING THE WRIT

POINT I

The Circuit Court in Its Duty of Supervision of the Trial Court Should Have Reversed Its Decision Because of the Unwarranted and Arbitrary Refusal of the Trial Court to Permit the Defendant-Appellant to Be Represented at This Trial by Counsel of Its Choice.

The late distinguished Justice Black has stated so eloquently that the right to be represented by counsel of one's choice is a basic and fundamental right of all litigants. This right was denied petitioner of record in this case.

This is not a situation of a flare-up between Court and counsel in the middle of a tense trial. There had been no testimony taken and upon the attorney of record moving Samuel C. Otto and two associate attorneys, all from New York, for association as active co-counsel in the trial, the following incredible and offensive remarks emanated from the bench:

> "The Court: I am amazed that your client finds it necessary to send three lawyers out here clear across the country to participate in this case. I can't understand it. What is your feeling about this, Mr. Zinn?
>
> Mr. Zinn: I'm very happy to have any assistance they would give.
>
> The Court: It kind of looks to me like you are getting into a position of heads I win, tails you lose, but if that is the way you want, I will permit these gentlemen to associate with you.
>
> Mr. Zinn: Thank you, your Honor.
>
> The Court: I want you to understand, though, Gentlemen, that you are going to have to accommo-

date yourselves to my dates and my times. That is one of the big troubles I have had with outside counsel in the past, they are used to proceeding at different hours and they have busy calendars in the place that they come from and want continuances, and that is one of the reasons that I have objections to having outside counsel associate in cases here. It has never worked out well. But with that understanding, and I am looking to Mr. Zinn as chief counsel at all times, all right."

This judicial tongue-lashing administered by the Court for the edification of designated chief counsel of petitioner and his two associate lawyers, solely for being "strangers within the gate", constituted judicial constraint of major proportions and rendered ineffectual, for all practical purposes, the independent active participation of the designated chief counsel, Samuel C. Otto and his two New York admiralty lawyer-assistants lest their full participation in the trial of the action further enhance the announced predeliction of the Court against "outsiders" in his Courtroom, which his words indisputably established that he regarded as his personal judicial fief, in which "outside" lawyers, to say the least, were not welcome. A basic and inalienable right to be represented by counsel of its choice was summarily and without cause denied the petitioner.

That expert admiralty counsel's participation in and direction of the case was required for the petitioner to have had a fair trial is abundantly established by the Record.

The court may mark an apparent anomaly in that: (a) Bellingham is relying on the strong inference drawn in admiralty cases against one who does not permit a survey by opposing parties and, yet, (b) in the pre-trial order,

Bellingham's counsel of record stipulated the correctness of the damages (R. 143).

Counsel of record for Bellingham in the argument of the Motion for Reconsideration at the trial argued in favor of drawing the inference against Intalco, indicating that he had been "boxed into" stipulating damages at pre-trial because he had no controverting evidence to present at the time of pre-trial.[1]

The regressive and alienating conduct of the trial court ill comports with the open door to all counsel policy in the Federal Courts in which maritime lawyers have heretofore been at home in any District or State in the Country, and the reversal of the Circuit Court's affirmance of the trial court's judgment is urgently required so that a trial, in which petitioner may be represented by counsel of its choice may be held at which the rights of all the parties to the action may be impartially determined.

The Court had no animadversion whatsoever to the legion of local counsel representing the various parties at the counsel table including the chief counsel for respondent, Intalco, who was prior to the Court's designation to the Federal Bench, one of his law partners (see Appendix, Exhibit C).

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[1] "Mr. Zinn: The other point I wish to make, your Honor, is this: We were more or less at the mercy of the Intalco people on this question of damages and in effect were boxed into admitting in the pretrial order the amount of the Intalco damage. I say that for this reason: Guy Williams, the crane operator, testified that he was not permitted to go up into the cab immediately after the accident happened. Dennis Brown, one of our experts, was permitted to testify that he went to Ferndale I think after the accident occurred and was denied access to the pier. He did get to go back some four or five days later. Of course by that time, everything had been pretty well restored to its original condition. Intalco personnel swarned all over the thing, so there wasn't much to find after the fact, so to speak." Transcript hearing on argument of Motion for Reconsideration at page 8 (See appendix).

POINT II

There Is No Credible Evidence Whatsoever of Negligence on the Part of Defendant-Appellant But Only Speculation by Experts Largely Based on a Survey of the Damaged Crane From Which Petitioner's Expert Was Excluded.

The captioned actions, "In Admiralty No. 300" and "In Admiralty No. 308," arose out of the same casualty which was caused by the falling of the boom of a dock crane on to the SS TROJA on December 1, 1966. The actions were consolidated for trial and all other purposes.

In Number 300, the partnership Wilh. Wilhelmsen, composed of Dampskibsaktieselskabet Den Norske Afrika Og Australieline, Wilhelmsens Dampskibsaktieselskab A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V, and A/S Tankfart VI (Wilhelmsen), owner of M/S TROJA and A/S Kristian Jebsens Rederi (Jebsens), time charterer of TROJA, brought action against:

(a) Intalco Aluminum Corporation (Intalco) lessee of a dock and of the crane thereon which was used by Intalco at Ferndale, Washington, for the discharge of bulk alumina;

(b) Bellingham, who furnished the operator of the crane pursuant to a stevedoring contract with Intalco.

Intalco impleaded McDowell-Wellman & Co. (McDowell) as a third-party defendant in Number 300. McDowell had participated in the design and had fabricated the crane and supervised the installation of the crane on Intalco's premises.

In Number 308, American Metal Climax, Inc. (American Metal), voyage subcharterer of the TROJA, brought ac-

tion against Bellingham for damage sustained when the crane boom fell upon TROJA. Bellingham impleaded Intalco as a third-party defendant; and Intalco cross-claimed against Bellingham and McDowell to recover crane-repair costs.

A pretrial order was entered which set forth the admissions and contentions of the parties (R52-79; R142-145).

The M/S TROJA arrived at Ferndale, Washington, and moored at Intalco's dock on or about November 28, 1966 to discharge its cargo. The discharge of the cargo was being accomplished by the use of the dock crane. During discharge, this crane was operated by various crane operators, one of whom was Mr. Guy Williams (Williams). The crane was under lease to Intalco.

Williams had been a longshoreman by occupation since 1961, working out of a local union hall (239). He received a crane operator's certificate in 1965 for which there was a prerequisite of 240 hours on-the-job training under an instructor. He held that certificate at the time he was operating the crane at the Intalco pier in discharging the TROJA (241). He had operated cranes in Bellingham and all over the Puget sound area, including cranes similar to the Intalco crane in question. He estimated that 40% of his working life since he commenced training in crane operation in 1965 had been operating cranes and that the average number of hours that he was employed during a year would be approximately 2,000 (240-241).

Williams was a member of the Labor Relations Board Committee in his local union and a member of the Governor's State Safety Board. He was also a union delegate on a coast-wise committee represented in the International Union (241-242).

Williams had received instruction in the operation of the specific crane being used to discharge the TROJA at the Intalco dock at Ferndale. Instruction was given by a representative of McDowell with representatives of Intalco present (243).

The crane involved in the accident was put in operation at Ferndale in the Spring of 1966, and Williams had operated said crane since then working all vessels, except one or two, that had called there to be discharged, although not always as a crane operator (244-245).

The crane was boomed up and secured in an upright position at 1650 hours on December 1, 1966. This fact is confirmed by Intalco's witness, Ralph C. Cramer, an engineer employed by Intalco, upon consulting Intalco's log book (193), as well as by Williams (273). No attempt was made by Intalco to prove that its log or Cramer's testimony was incorrect.

Williams, according to Cramer, boomed up the crane and secured same in an upright position because:

(a) The wind was very severe. *The crane swayed excessively* (194) in the severe gale force wind which was then blowing, and;

(b) The crane could not be operated by reason of repairs then being made by Intalco to the bucket-lift mechanism (193).

At 1700 hours, the longshore crew went home and Cramer provided transportation for them to the end of the pier (193, 195).

At 1705 hours on December 1, 1966, *fifteen minutes after* the boom had been secured in an upright position, the boom fell onto the vessel TROJA (Pretrial Order, R74).

After the crane had been "boomed up" and *before* the boom fell, Williams reported his reasons for "booming up" to Cramer, who approved same (194). At that time the boom was properly latched and everything was secured in a vertical position according to Cramer (195).

The boom of the crane while in a working position is normally horizontal. The ore bucket travels along with the boom until it is positioned over the hatch of the vessel where it is caused to descend into the vessel hatch to pick up ore and is then caused to be lifted and returned to the hopper for discharge (174).

Because the boom in its horizontal position is extremely sensitive to wind, the operators have "standing instructions" to "boom up" to a vertical position against the king post when there is a strong wind blowing (270).

A wind force measurement instrument causes a siren to blow when the velocity of the wind reaches 50 miles per hour and causes all power on the crane to be automatically shut off and prevents any movement of the crane when the wind reaches 60 miles per hour (253).

On December 1st the weather was *extremely bad.* The siren sounded *frequently* during the last hour or two before the boom was secured upright by Williams until Intalco's chief engineer, Cramer, finally pulled the fuses (224). They had to sit for quite a period of time and wait for the wind to die down before the crane could be moved (254), and Cramer was *coerced* by the bad weather conditions into leaving the pier at about 1700 hours (195).

The siren sounded more than once during the fifteen minute interval between the securing (at 1650 hours) and the falling of the boom (at 1705 hours) (279).

The drum, upon which the twin cables which raised and lowered the boom were spooled, was operated by a con-

stant speed motor whose speed was such that it required 7.43 minutes *altogether* to unwind and rewind all said cable on the drum. This was the testimony of Homer B. Lupton, an engineer called as a witness by Intalco and American Metal (473). This was confirmed by Bellingham's expert, Ty Fiske (691). Said 7.43 minutes was the total time lapse required for the boom to proceed from a vertical position to the horizontal and back to the vertical, or for the drum to fully unwind and fully rewind the cable. One of the cables apparently ran off the drum and broke upon rewinding but the other cable rewound on the drum lifting the boom (566-567).

Williams testified that it took about 3½ to 4 minutes to lower the boom from vertical to horizontal and the same time to raise it from horizontal to vertical (273, 274).

The crane was equipped with a safety device, sometimes called a "dead man" control, which prevented the boom from being elevated beyond a certain point near the limit of its upmost travel unless a "bypass" button and the "up" button were simultaneously pressed; but the crane was *not equipped* with a similar safety device which would prevent its downward travel from the secured upright position even though such safety device could have been easily, quickly, and inexpensively installed. This was the undisputed testimony of Bellingham's expert witness Henry Brown (418).

As the crane was designed and equipped the boom motor would turn in a down direction by *momentarily pressing* the "down" button (417), even when the boom was secured in an upright position in the safety dogs and latches, and which admittedly was a critical position of the boom.

Intalco's chief engineer, Cramer, had supervised the engineering and approved the design drawings of the crane

(167) and did more engineering on the crane than anyone else outside of McDowell and the Bechtel Corporation people (173) despite the fact that he had had no prior experience in design and drawing specifications of cranes (207).

No opportunity was granted to Bellingham to inspect the damages before repairs were made to the crane.

Repairs were started after the accident (204). Nevertheless Williams, who returned to the crane immediately after the accident, and started to walk toward the crane, was told by one of the maintenance men, "Don't go in there, don't go in there, there may be live wires around" (273).

Bellingham's expert, Brown, had to make two trips to the Ferndale plant before he was permitted entrance. On the first occasion, December 2, 1966, he was refused entrance to the plant, despite the fact that repairs were already underway at the time. About four or five days later he returned and was, for the first time, permitted to make an inspection (413).

Just prior to the trial, Bellingham's expert, Duncan, was refused the right to go into the plant and inspect the motor starter (408).

Power to the crane had been shut off within minutes after the accident. Intalco's electrical superintendent Pfeiffer was in the office of the chief engineer of the Ferndale plant when the accident occurred and was informed of the accident by a telephone call from the pier, arrived there ten minutes after the telephone call, and within five minutes opened the main breaker to the motor generator set and shut off all power to the crane (452, 453, 455).

The above stated facts are not controversial. Williams' testimony, summarized below, is not directly controverted

but Intalco and McDowell argued that his testimony was not consistent with the opinions of the experts.

Williams gave a detailed statement to representatives of Intalco several days after the accident; he was examined at length before trial, more than one year prior to the trial and was examined at length upon the trial.

His statement, his pretrial testimony and his testimony upon the trial are consistent throughout and no serious attempt was made to impeach his credibility.

The trial court relied solely and entirely on the existence of "inconsistent physical facts" which rebut Williams' statement and undisputed direct testimony.

Williams testified in detail concerning exactly what he did in raising the boom from the horizontal and securing same in a vertical position against the king post on the afternoon of December 1st as follows (257-268):

a) He released the mechanical hand brake at the motor drum.

b) He proceeded from the motor room to a higher station where the boom hoist motor controls are located.

c) He pressed the "up" button until the upward movement of the boom was automatically stopped by an upper limit safety control switch. (At a point below the safety dogs which were about a foot below the maximum limit of upward travel of the boom.)

d) He then simultaneously pressed the "by pass" button and the "up" button until the boom had been raised above the safety dogs which serve to secure the boom in its upright position.

e) Williams then pressed the "down" button until he heard the boom click into the latch or safety dogs.

f) Williams finally pressed the "stop" button.

g) He then tested the lever which serves to raise or lower the safety dogs and ascertained that the boom was secured in the safety dogs and the cables were not slack.

h) He knew the boom was secured in the dogs when the lever did not move them when it was pressed.

i) Williams then returned from the higher boom-hoist control station to the motor room, set the mechanical hand brake and personally knows that the motor was *not moving* (266-267).

j) *After* all of the foregoing, Williams, at 1650 hours descended to the dock level.

On the dock, Williams met Cramer and told him why he had boomed up the crane and Cramer agreed with and concurred in Williams decision to boom up the crane.

At 1705 hours, 15 minutes after the boom had been secured, the boom fell.

The Court erred in holding that the speculative deductions of experts constituted uncontroverted physical facts.

Despite Williams' positive testimony, and the fact that *it admittedly took but 7.43 minutes* for the boom and its motor to make one complete cycle from the upright position of the boom to the horizontal and back to the vertical, and the proved fact that the accident happened 15 *minutes after* the boom was secured, the trial court theorized:

a) That Williams had failed to press the stop button after he had lowered and secured the boom in an upright position in the dogs; and

b) That Williams had failed to set the mechanical hand brake.

The veracity of crane operator Williams has nowhere been questioned. He was frank, articulate and honest. The trial court could only suggest in its opinion that Williams might honestly have been mistaken in believing he had performed the operations he testified to (R181).

The record herein cannot support a finding of honest mistake. Williams' definite and certain, positive and detailed testimony was either correct or it was false.

He was precise as to what he did on December 1, 1966, namely: that he pressed the "stop" button when the boom was in the dogs, tested the "dog release lever," looked at the falls to see if there was any slack in the boom cable, went down to the motor room, set the mechanical brake on the winch drum, and *personally knows* that the motor was *not* running (266-267).

Williams frankly admitted he did not disconnect the motor generator. He explained how he deliberated and then decided to leave the motor generator connected because of work then being done by Intalco on the bucket lift mechanism (280).

Had Williams failed to press the stop button:

> The slackening and unwinding cable caused by the motor turning downward would have been immediately and unmistakably noticeable when Williams tested the lever which raises and lowers the safety dogs.
>
> The cable on rolling from the drum in the motor room would have been immediately and unmistakably noticeable by Williams when he proceeded thereto from

> the higher station where the boom hoist motor controls are located. The turning of the motor and drum in the motor room would have been immediately and unmistakably noticeable by Williams when, as he testified, he set the hand brake . . .

and Williams could not have been honestly mistaken but would have been intentionally untruthful when he testified (266, 267), *"I personally know that the drum was not moving."*

The accident would have had to happen at 1657.43 hours instead of 1705, since, as the experts of all parties admit, and there has been no contradiction thereof, the complete unwinding and rewinding of the boom hoist cables took only 7.43 minutes (473, 474, 691) after the boom was secured in an upright position at 1650 hours (193), and which would have had to be 7.57 minutes *before* the time the boom fell at 1705.

There was no factual proof that Williams had not set the mechanical hand brake; the hand brake was not designed to, nor would it, stop the motor under power (575, 576).

After the accident the hand brake lever could not be moved and a component of the hand brake system had been moved out of position (577); and the metal bed plate upon which the hand brake rested and to which it was secured was found immediately after the accident to have been severely distorted, showing that it had been acted upon by a large force that had deformed the steel (579, 580, 581); and the hand brake could not be moved in any direction until the frame was cut and straightened (199).

After demonstrating that the brake system had been deformed by a great force, it was compounding one inference or "theory" upon another inference or theory to presume

or expect that the hand lever of the brake would be in the same position after the accident that it had been prior to the accident.

The trial court, in its Opinion, stated that while it did not believe Williams to be a dishonest witness, it thought his testimony could be rejected as inconsistent with the "uncontroverted physical facts" (R181).

Speculative deductions of experts are not facts. The court was mistaken: it was not relying on uncontroverted physical facts but conjecture and speculations of experts based on physical facts which Intalco kept jealously to itself by excluding petitioner's expert from the scene of the accident until it had made its own repairs and changes in the evidence.

The doctrine which permits unimpeached testimony to be rejected when there is a conflict with facts established by the evidence is qualified by the rule that the physical facts must be irrefutably established and permit of only one deduction and that the testimony of a seemingly honest witness is not to be rejected because of conflicting evidence.

This rule is confirmed and stated in the case of *Nethom* v. *Berenschot,* 89 N.W.2d 289, 3 Wis.2d 585 (Sup. Ct. Wis. 1957), at page 589:

> ". . . appellant argues that the location of all of the debris from the accident on the south half of the highway renders Schmechel's testimony incredible, under *Stetad* v. *Cooperative Insurance Mutual,* 256 Wis. 261, 40 N.W.2d 552, and similar cases in which we have held that established physical facts may destroy the credibility of testimony inconsistent with such facts. We have also held, however, that the probative value of testimony is not destroyed by physical facts

> unless the physical facts are irrefutably established and permit of only one deduction. *Blom* v. *Kumbler*, 275 Wis. 227, 235, 81 N.W.2d 528."

Here the physical facts which the court must have relied upon as irrefutably establishing and permitting of only one deduction are impugned and rendered questionable by the fact that no opportunity was granted by Intalco to Bellingham to inspect the damages before the repairs, which were started immediately after the accident, and by the fact that Williams was not permitted to view the damage immediately after the accident; that Bellingham's expert, Brown, was refused entrance into the Ferndale plant on the day following the accident and was first permitted to inspect the crane four or five days later; and that Bellingham's expert Duncan was refused the right to go into the plant and inspect the motor starter just prior to the trial.

It may not properly be said that Intalco's *version* of the facts, which the court held to be "uncontroverted," are indeed the real facts when Bellingham was refused permission to inspect the damaged mechanisms before they were altered.

Rather, it should have been held that Intalco's refusal to permit inspection before alteration of the mechanism was "guilty knowledge" of the cause of the accident. *Wong* v. *Sivier*, 267 F.2d 749, 759, 760 (C.A. 1959).

> "Such secret inspections for the purpose of obtaining evidence for a litigation have been frowned upon by courts of Admiralty and they are accorded diminished weight." *Frederick Snare Corp.* v. *Moran Towing & Transp.*, 195 F.Supp. 639 (S.D.N.Y. 1961), 1961 A.M.C. 2605, 2610, and numerous cases cited therein.

The evidence by Intalco and McDowell fails to explain why the accident did not happen until 15 minutes after

the boom was secured, and fails to exclude the probability that the activation of the boom motor may reasonably be attributed to other causes than the failure of Williams to press the "stop button."

It is uncontroverted that 15 minutes elapsed between the securing and the falling of the boom. Intalco and McDowell failed to submit any evidence to contradict this statement and Intalco's log that the boom was secured at 1650 hours or Cramer's testimony that the boom was secured at 1650 hours. All parties agreed that the boom fell at 1705 hours.

The evidence failed to explain how the accident could have occurred 15 minutes after the boom had been secured. No evidence was submitted to contradict the testimony of Intalco's expert, Lupton (473, 474), or Bellingham's expert, Fikse (691), that the entire cycle of unwinding and rewinding the cable on the motor would be completed in 7.43 minutes. The time of said cycle was readily and exactly computable from the speed of the constant speed motor which rotated the drum.

This 7.43-minute cycle is a fact and not a "theory."

Had Williams not pressed the "stop" button after booming up, the accident would necessarily have had to occur within 7.43 minutes of 1650 hours; and this clearly proves that Williams pressed the "stop" button and did not leave the motor running when he secured the boom at 1650.

Had the "stop" button not been pressed the slackening cable would have been immediately and inescapably noticed by Williams when he tested the hand lever which operates the dogs, and would have been immediately and inescapably noticed by Williams when he returned to the motor room and set the hand brake.

Furthermore, the activation of the boom motor could reasonably have been caused without any human intervention by a short circuit and/or by the activation of the "down" motor starter after the boom *had* been properly secured by Williams, as was testified to by McDowell's experts Engineer Thomas Sporting (663) and Walker (590). Furthermore, McDowell's expert Ishma Mozingo, an electrician, testified (498, 499) to damage to the electrical circuiting; that the wiring and lights on the boom were off and that the connections to the cab and the boom controls had to be required. This witness further admitted that he did not check into the short circuiting and lowering of the boom and conceded that there are short circuits which do not leave evidence of short circuiting (504).

The trial court, unfortunately, insisted on post-trial briefs limited to the question of charterer's damages (R 153). It was not until the argument of the motion for reconsideration of the court's decision that the implications of the time lapse between securing the boom and the collapse of the boom versus the time lapse for unspooling and rewinding the cable on the drum, that the implications were forcefully brought home to the trial court.

At the argument of that motion, counsel argued strongly that the accident could not have occurred as contended by Intalco inasmuch as 15 minutes had elapsed between the time the boom was secured and the boom fell, while the complete sequence for unspooling and rewinding the cable would take a total of only 7.43 minutes. This colloquy is reported on pages 7-8 of the transcript as follows:

> "Mr. Zinn: How do you explain the time element, your Honor?
>
> "The Court: I think these times were approximate. I think unquestionably they were approximate. They

could not have been exact: If I am bound by the times that are stated in the pretrial order, and it does say that at 1705 the number two hatch was damaged by the falling of the crane—where is the other time?

"MR. ZINN: The other time is in Mr. Cramer's deposition testimony taken from the Intalco log.

"THE COURT: The times must be wrong or the operation was slowed down by this one cable that wrapped itself or got twisted around the shaft.

"MR. ZINN: Isn't your Honor making an assumption upon which there is no evidence?

"THE COURT: What assumption am I making?

"MR. ZINN: That these times must be wrong. According to Mr. Cramer's testimony the boom was already up because he talked to Guy Williams and asked him, 'Why did you raise the boom?' and that was before five o'clock.

"THE COURT: Proceed."

The court, apparently, was willing to make either finding to hold Williams negligent, although neither is supported by the record. He would either find that the times were approximate or that the twisting of the one cable resulted in a greater period of time for the unspooling and rewinding sequence.

In light of this inability of the trial court to make a sustainable finding on this question, the court's holding that Williams' testimony was inconsistent with uncontroverted physical facts must fall. This court on appeal must arrive at the conviction that a serious mistake was made in the findings by the court below, and that the conclusion of the trial court that Williams was negligent is "clearly erroneous."

Other likely causes of the accident than the negligence of the operator were not excluded by the evidence. The

boom motor could reasonably have been activated by either a short circut or the excessive swaying and vibration of the crane in the severe gale-force winds described by Intalco's chief engineer, Cramer, which had forced him to go home at 1700 hours after the boom had been properly boomed up, latched, and secured at 1650 hours (193-195).

Where various possible causes of an accident exist and not all of them can be attributed to the party charged, there is a failure of proof.

As stated by the court in *Lamb, et al* v. *Interstate Steamship Co., et al.*, 149 F.2d 914, 916 (C.A. 6, 1945):

> ". . . if the injury complained it might well have resulted from one of many causes, it is incumbent upon the libelant to produce evidence which will *exclude* the operation of those causes for which the Master or the crew was under no legal obligation. If the cause of the injury may be as reasonably attributed to an act for which the Master and the crew is not liable as to one for which they are, libelant has not sustained the burden of fastening tortious conduct upon the Master or crew. The evidence showing negligence must come from witnesses who speak as knowers, not as guessers." See also *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U.S. 104, 112 (1941); *Home Ins. Co.* v. *N.P.R. Co.*, 18 Wn.2d 798 at 803, 804, 140 P.2d 507 (1943); *Gardner* v *Seymour*, 27 Wn.2d 802, 808-811, 180 P.2d 564 (1947). (Emphasis supplied)

Considering that the burden was on Intalco to prove that Williams negligently caused the boom to fall, the court's statement that Bellingham's proof of possible causes of the fall of the boom other than from the operator's negligence was "speculative" was misdirected.

It is respectfully submitted that the court's said finding should have been directed to the speculative and theoretical "proof" submitted by Intalco and McDowell.

Intalco and McDowell's "proof" was contradicted forcefully by Williams' testimony that he pressed the "stop" button and conclusively contradicted by the factual impossibility of the accident's happening 15 minutes after the boom was secured.

It is respectfully submitted that the trial court erred in holding that Williams' testimony was contradicted by "uncontroverted physical facts."

The trial court should have found that the plaintiffs had failed to establish by a preponderance of the evidence that the defendant was negligent and that such negligence was the proximate cause of the damage to plaintiffs' property.

The crane was not safe. Intalco's chief engineer, Cramer, supervised the engineering and approved the design drawings of the crane (167) and did more engineering on the crane than anyone else outside of McDowell and Bechtel (173) despite the fact that he had no prior experience in design and specifications of cranes (207).

It had been in operation but nine months prior to the accident, the first acceptance test having been performed in March, 1966 (173). During its brief operation it had broken down many times.

On one occasion the electric brake failed during the lowering of the boom and the motor burned out (191).

On one day, the day of the accident, a pin broke in the bucket at 1100, a payloader was placed in No. 2 hold at 1130, the belt on the cross-feed stopped at 1510 and was down for 35 minutes. The conveyor was again stopped at 1635, this time because of the silo belt (193).

For some time after the motor burned out, the crane was operated without an electric brake on the motor, and Cramer admitted (228):

> "A. Yes. *They should always have helped because this thing at this time was dangerous and could have run away.*"

Nevertheless Intalco did not hesitate to operate the crane for months in its admitted dangerous condition.

The crane had no effective limiting device to prevent the complete unspooling of the wire on the drum.

Cramer admitted (210):

> "Q. Well, let me state it this way: Suppose that on the existing system of controls that you have, that you had on December first, 1966, the operator was in the process of lowering the boom from vertical to horizontal position He had pressed the Down button and the boom is traveling down to the horizontal. The operator has a heart attack. Is there anything thing from rewinding and going back up to the vertical?
>
> "A. No, there's not.
>
> "Q. And causing exactly what happened here to happen?
>
> "A. No, there is not anything.
>
> "Q. There are devices that could be used, such as a dead man control I'm referring to, to prevent this, are there not?
>
> "A. Yes, there are."

and Intalco's and American Metal's expert, Lupton, testified and admitted (482):

> "Q. So that if the crane did in fact operate the way Mr. Cramer said it did (210 above quoted) then it

would not be a safe, proper or standard crane, is that right?

"A. Yes, assuming that this device is not in there."

There were other defects in the design of the crane.

While there was a safety control which stopped the boom (in its upward travel near a vertical position) at a point just below the dogs and which required the momentary and simultaneous pressing of the "by-pass" and "up" buttons to elevate the boom into and above the dogs, *there was no safety control on the crane which required the momentary and simultaneous pressing of the "by-pass" and "down" buttons to lower the boom* the short distance from a position in or above the dogs to point a foot or below the dogs (319, 320, 355).

Such a safety control could have been easily, quickly, and inexpensively installed and would have prevented the accident herein.

The crane involved in the accident was negligently designed and equipped and disregarded the standards established by the National Safety Council and even minimal standards of safety.

The National Safety Council, a federally chartered corporation incorporated by Act of Congress August 13, 1953, in its *Manual of Accident Prevention for Industrial Operations* (6th Edition) with specific reference to "fail-safe" or "dead-man" controls on cranes states (p. 539):

"Each controller and operating lever should be marked with the motion it controls and its direction. These levers should have spring returns so that they will move automatically into the 'off' position and latch themselves there if the operator releases the handle."

The crane herein had no spring return which would automatically return the system to the "off" position or latch itself there when the crane was not being operated.

The crane even lacked *momentary safeguards* with which other McDowell cranes were equipped (511, 512), which would have required the momentary and simultaneous pressing of the "by-pass" and "down" buttons to lower the boom, a matter of but a few feet from the dogs or safety latches, and which would have required only seconds of operation (522, 523, 524, *supra*).

The crane involved herein lacked the safeguards with which two-thirds of the cranes were designed by one of McDowell's witnesses (650-651).

The trial court's decision incorrectly assumed, contrary to the National Safety Council standards, that it was unnecessary to equip a crane with fail-safe controls, even though it held that such controls "might have prevented the accident."

The National Safety Council's recommendations and standards go much further than those argued by Bellingham in this case and hold that *"special considerations must be given to human factors"* stating (pp. 90, 91):

> "When safety is being designed into machines and equipment, *special consideration must be given to human factors.* Almost every machine requires an operator, and the mechanisms of many machines have become too complex to be understood by the average operator. Therefore, machines and equipment should be designed in terms of human limitations and capabilities, both mental and physical. Also see the next chapter, 'Human Factors Engineering.'

* * *

"Advance analysis: If there are any defects in the design of a piece of machinery, it is usually only a matter of time before some operator fails and an accident ensues. Therefore, *all possible faults in the design of equipment and all possible hazards in the work area of a machine, as well as the physical and mental capabilities of the operator, should be studied in advance for the purpose of* preventing accidents.

• • •

"A wide margin of safety should be provided to eliminate any possible situation that places the operator near his maximum ability with regard to aptitude or effort, especially when adverse factors enter the picture."

The crane herein disregarded even the minimum standards of safety argued by Bellingham.

The courts are increasingly adopting the philosophy of its National Safety Council: an industrial accident caused by human fallibility if reasonably preventable by technology is legally foreseeable and the manufacturer who fails to design such preventive devices into his product is culpable.

In *Larsen* v. *General Motors,* 391 F.2d 495 (C.A. 8, 1968), the court, after citing National Safety Council Statistics at page 502 of its opinion, stated with respect to safety design in motor vehicles at page 503:

"We perceive of no sound reason, either in logic or experience, nor any command in precedent, why the manufacturer should not be held to a reasonable duty of care in the design of its vehicle consonant with the state of the art to minimize the effect of accidents. The manufacturers are not insurers but should be held

to a standard of reasonable care in design to provide a reasonably safe vehicle in which to travel."

Frumer-Friedman in their standard work on *Products Liability*, state in Vol. I, §702 at page 115 as follows:

"Moreover, a manufacturer should incur responsibility for foreseeable injuries caused by dangers which were appreciated but momentarily forgotten at least where it is feasible to install a safety device to eliminate the danger."

By failing to install a fail safe switch, a common device, the crane was unsafe as designed, and the trial court adopted an erroneous legal standard in absolving McDowell-Wellman & Company.

Subsequent to the filing of briefs and submission of oral argument in the Circuit Court, the Court of Appeals of the State of Washington, in *Lamphiear* v. *Skagit Corp.*, 6 Wn. App. 350, 493 P.2d 1018 (1972), had occasion to rule upon the liability of the manufacturer of a crane for failure to design the crane with sufficient safety devices to render it safe to operate.

One of the claimed design defects which the court approved for submission to the jury was the failure of the manufacturer to install warning devices which would advise the operator of the crane whether or not the crane was in proper operating condition (specifically, flags or markers to indicate when and if the crane boom was fully extended and locked into place. 6 Wn. App. 354, 493 P.2d at 1021).

The court approved the following jury instruction stating the law with respect to this claim:

"A manufacturer of a portable spar tree to be used as a yarding tower is liable in damages where it has

been proved by a fair preponderance of the evidence that;

"(1) A manufacturing defect existed;

"(2) The defect rendered the product unreasonably dangerous; and

"(3) Such defect was a proximate cause of plaintiff's damages.

"Where such a defect is proved, liability exists even though the manufacturer has exercised all possible care in the manufacture of the product."

6 Wn. App. 352, 493 P.2d at 1020-1.

The trial court in the instant case did *not* find that there was not a defect in the manufacture of the crane, but found that it was excusable not to install the simple, inexpensive safety switch on the "Stop" button, because such a device was sometimes "defeated" by crane operators. The proposition that a possible future act of negligence could excuse negligence in design of the crane is a unique one that cannot be supported by common sense or law.

The "fail-safe" switch itself is a switch or button that automatically returns to a neutral or off position when the operator leaves the station, thus such a switch on the down mode of the "Stop" button, would have absolutely prevented the entire casualty if McDowell-Wellman had installed it. (R. 380; Appelalnt's Brief pp. 29-36).

The court in *Brooks* v. *Allis Chalmers Mfg. Co.,* 163 Cal App.2d 410, 329 P.2d 575 (1958), held at page 414 that defendant's liability for negligent design of a crane was not necessarily cut off by the intervening negligence of the operator, if such negligence could be foreseen.

POINT III

Jebsens, the Time-Charterer, and American Metal Climax, the Voyager-Charterer, Cannot Recover Against Bellingham.

Jebsens, as time-charterer, and American Metal Climax, as voyager-charterer, sought recovery against Bellingham for alleged damages sustained by them under their charter parties. Jebsens was a time-charterer under a charter party with the owner of the TROJA and American Metal Climax was sub-charterer on a voyage charter between it and Jebsens. Neither of these parties had any demise interest in the TROJA.

The District Court concluded in its opinion at page 9 that:

> "Jebsens, as time-charterer, has no direct right to recover against the tort-feasor of owner Wilhelmsen. *Robins Dry Dock & Repair Co.* v. *Flint,* 275 U.S. 303, 72 L.Ed. 290 (1927). However, Jebsens argues it should have subrogation rights and that it had a duty to pay or alternatively a payment was made in good faith by mistake of fact and law."

The District Court then concluded that Jebsens had a good faith doubt as to its liability for charter hire during the time when the vessel was prevented from working because of the accident and concluded that his belief, even though mistaken, would remove Jebsens from the category from a "mere volunteer" and allow subrogation to the TROJA's rights against Bellingham. The court did not discuss the theory on which American Metal Climax was permitted to recover.

It is submitted that this case is governed by the principle of *"res inter alios acta"* as it has been applied specifically to maritime cases where a party with less than a demise interest in a vessel seeks to recover its charter based damages against a *tort-feasor* who caused damage to the vessel.

In the case of *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303, 72 L.ed. 290 (1927), the Supreme Court held that a charterer whose charter was less than a demise had no cause of action against a *tort-feasor*. Not having a property interest in the vessel, or being in privity with the *tort-feasor*, the *tort-feasor* owed no duty to the charterer. On a more realistic basis, it can be seen that the *tort-feasor's* liability for loss of use of the vessel cannot be measured by the chance provisions in a charter party between the owner and a charterer or between a charterer and sub-charterer.

Taking the matter a further step, it is clear that the alleged damages or a substantial part of the damages claimed by Jebsens were not even damages at all, but appeared to be merely an accommodation made by Jebsens to the owner of the TROJA thus giving Jebsens no right by way of subrogation at all. *Nelson* v. *Sponberg*, 51 Wn.2d 371, 318 P.2d 951 (1957); *United Boat Builders Inc.* v. *Tempo Products Company*, 1 Wash. App. 177.

The complaints both of Jebsens and American Metal Climax should be dismissed; they do not state causes of action.

CONCLUSION

Petitioner submits that this court should reverse the Judgment of the Circuit Court of Appeals Ninth Circuit, against Petitioner as to each prevailing party, and remand the case for Judgment in favor of appellant against the following parties on the following bases:

1. Against Intalco for the reason that the evidence fails to establish the negligence of appellant by a preponderance of the evidence.

2. Against William Wilhelmsen for the reason that the evidence fails to establish the negligence of appellant by a preponderance of the evidence.

3. Against Jebsens and American Metal Climax for the reason that, as a matter of law, these parties are not entitled to recovery against appellant.

4. For indemnity of appellant against McDowell Wellman, in the event any portion of Relief 1-3 is not granted, by reason of the defects and the inherent vice in the crane.

It is respectfully submitted that business litigants are as much entitled to the protection by the Federal Courts of their civil and constitutional rights as are oppressed minorities, recidivists or sovereign states, and that exclusionary concepts have no place in the Federal Court system, which is national and not regional in spirit and in fact; that the right of any litigant to be represented by counsel of its choice may not be limited or restricted by a court's predilection for or animadversion against counsel on the basis of whether such counsel is or is not indigenous to the community in which the court presides and the trial is

to be held. The Supreme Court should make this trumpet clear to all Circuit and District Judges in every state of the Union.

Respectfully submitted,

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